Supreme Court, U.S.
FILED

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NO._____

In The
Supreme Court of the United States

TOWNER LEEPER & LAFONNE LEEPER,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTIONS PRESENTED FOR REVIEW

The IRS seized and sold an asset owned by Petitioners, Towner Leeper and his wife LaFonne Leeper. Towner Leeper received actual notice of the sale, LaFonne Leeper received no notice.

The District Court and the Fifth Circuit below ruled that although the IRS recklessly and intentionally violated the due process (notice) requirements of 26 U.S.C. §6335(b), such violation would not result in damages under 26 U.S.C. §7433 nor void the sale since it was unlikely that Petitioner LaFonne Leeper would have exercised her due process rights or otherwise taken any action. The questions presented are:

1. Is it proper for the Fifth Circuit to deny (by Summary Judgment) Petitioner her 26 U.S.C. §6335(b) due process rights by speculating the Petitioner, had she received actual notice, may not have taken any action, or is the sale void as determined by the Ninth, Second, and Tenth Circuit Courts of Appeal, and the Federal Claims Court?

2. Is this also a violation of the Fifth Amendment's proscription against the government's taking of property without due process, as determined by the Third Circuit Court of Appeals, so that her ownership is not extinguished by the sale?

LIST OF PARTIES

Petitioners, Towner and LaFonne Leeper, are individuals with no corporate affiliations.

Respondent is the Commissioner of Internal Revenue.

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PETITION FOR WRIT OF CERTIORARI

TOWNER LEEPER & LAFONNE LEEPER respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 9, 2002. The Fifth Circuit has decided an important question of law which is in conflict with several other circuit courts and should be settled by this court.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas, El Paso Division is published at 88 AFTR 2d 2001-5388 (DC Tx, 7/20/2001 and is reprinted in Appendix C hereto.), The opinion of the Fifth Circuit Court of Appeals is published at 90 AFTR 2d 2002-7053 (CA5, 2002) and is reprinted in (Appendix B hereto). By order filed December 26, 2002, the Fifth Circuit Court of Appeals denied the petition for rehearing en banc. Appendix A hereto.

JURISDICTION

The United States District Court entered its decision denying Plaintiff civil damages against the Internal Revenue Service and refusing to void the sale on July 20, 2001. Plaintiffs timely appealed the District Court's decision to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the decision of the District Court in an opinion filed on October 9, 2003. On December 26, 2002, the Fifth Circuit denied Plaintiffs' timely filed petition for rehearing en banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the Fifth Circuit's denial of rehearing.

The jurisdiction of the court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THIS CASE

The entire text of 26 U.S.C. §6335 and §7433 are reprinted in Appendix D and E hereto.

The portions of the Internal Revenue Code Section §6335 and §7433 relevant to this case are as follows:

§6335(b) Notice of Sale

The Secretary shall, as soon as practicable after the seizure of the property, give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or, if there be no newspaper published or generally circulated in such county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and the time, place, manner, and conditions of the sale thereof. Whenever levy is made without regard to the 10-day period provided in section 6331(a), public notice of sale of the property seized shall no be made within such 10-day period unless section 6336 (relating to sale of perishable goods) is applicable.

§7433(a) In General

If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

§7433(b) Damages

In any action brought under subsection (a), or petition filed under subsection (e) upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of $1,000,000 ($100,000, in the case of negligence) or the sum of –

(1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent actions of the officer or employee, and

(2) the costs of the action.

STATEMENT OF THE CASE

The facts in this case are simple and undisputed. Towner Leeper is a 75 year old federal tax attorney. He has been married to LaFonne Leeper for 50 years. They have resided in Texas, a community property state, since 1942.

In 1994, the plaintiffs failed to pay approximately $30,000 in income taxes. On August 22, 1996, the Internal Revenue Service seized and sold an asset of the plaintiffs (a judgment lien in the face amount of $248,229.50) at public auction for $40,022, the amount of the tax deficiency. The buyer immediately resold the asset "at wholesale" for $200,000.

The plaintiffs filed an administrative claim with the Internal Revenue Service claiming they had not received the notice of sale as required by Section §6335(b) and that such violation had resulted in economic damages (including lack of opportunity to protest against inadequate sales price at public auction) and personal injury (heart attack of Petitioner Towner Leeper).

Upon denial of their administrative claim, the Petitioners filed suit in United States District Court. The Internal Revenue Service filed a Motion for Summary Judgment. The relevant portion of the District Court's opinion from which this appeal lies is as follows:

> "The Court previously found in connection with the motion for summary judgment, and finds again after hearing the evidence at trial, that Plaintiff LaFonne Leeper did not receive notice of the auction sale by means of personal service, certified mail, or otherwise. The Internal Revenue Service was clearly required by statute (26 U.S.C. Section §6335(b)) to give her such notice. The Court further found, and finds again after trial, that IRS personnel recklessly or intentionally failed to comply with Section §6335(b). The only remaining issue with respect to the claim of LaFonne Leeper under Section §7433 is whether she is entitled to damages, and, if so, in what amount." See Appendix C, page 3, paragraph 4.

The court concluded its opinion by determining that Petitioner LaFonne Leeper had failed to prove that the Internal Revenue Service's:

> "reckless disregard of her right to notice was a proximate cause of any damages... , or it is unlikely Petitioner LaFonne Leeper would have taken any action had she received such required notice." Appendix C, page 4, paragraph 1

The Petitioners timely filed a Notice of Appeal. Oral argument was heard on September 30, 2002. The Fifth Circuit panel affirmed the United States District Court's determination that although the due process requirement of §6335(b) was clearly violated:

"the District Courts finding on the 'proximate results' issue is not clearly erroneous." Appendix B, page 2, paragraph 2.

Petitioners timely filed a petition for rehearing in banc which was denied by the Fifth Circuit on December 26, 2002. Appendix A.

REASONS FOR GRANTING THE WRIT

I. THE RECKLESS AND INTENTIONAL FAILURE OF THE INTERNAL REVENUE SERVICE COLLECTION DIVISION TO GIVE NOTICE OF SEIZURE AND SALE OF A VALUABLE ASSET CAUSED PLAINTIFF LAFONNE LEEPER TO INCUR SIGNIFICANT ACTUAL AND DIRECT ECONOMIC DAMAGES.

In the present case we have the unusual situation where both the District Court and Fifth Circuit found, and the Internal Revenue Service concedes, that the due process requirements of notice in Section §6335(b) were recklessly and willfully denied Petitioner LaFonne Leeper. The issue is whether she is entitled to damages and if so, in what amount.

Both courts below determined she is not entitled to damages because she testified that:

> "she did not have sufficient funds available to satisfy her income tax liability for the year 1994. Significantly she admitted that she left all decisions relating to their joint income tax liability and the methods of satisfying same, to her husband Towner Leeper..." "Come rain or come shine, LaFonne Leeper was going to

> leave all decisions and all actions regarding their joint income tax liability to her husband, Towner Leeper. Giving her actual notice of the proposed auction sales in advance would not have changed anything". See opinion of United States District Court, Appendix A herein, page 4, first full paragraph.

A. Split in Courts of Appeal

However, the Fifth Circuit decision is in conflict with several other Circuit Courts of Appeal. In *Goodwin v. United States*, 935 F. 2d 1061, 1065 (9th Cir. 1991) the Ninth Circuit Court determined the due process requirements of 26 U.S.C. §6335(b) must be strictly complied with. Accordingly, as between the petitioner and the Internal Revenue Service, the seizure and sale of the property was invalid. The Goodwin court cited a Second Circuit opinion in support of its position. See *Kulawy v. United States*, 917 F. 2d 729 (2nd Cir. 1990). The Goodwin ruling has been cited with approval in *Koby v. United States*, 47 Fed. Cl. 99 (2000) and in *Title Ins. Co. of Minnesota v. IRS*, 69 AFTR 2d 92-1202 (10th Cir. 1992).

The problem with the Fifth Circuit's opinion is that it reduces a fundamental constitutional right to a mere convenience. If a court determines that a taxpayer's right to due process is violated, such as where the taxpayer fails to receive notice of a tax sale, the taxpayer has been damaged by not being provided the opportunity to exercise her rights to due process. The damage is the loss of that opportunity. The remedy of the other Circuit Courts of Appeal is invalidation of the sale.

However, if the Fifth Circuit is allowed to speculate[2] that had she been given that opportunity, she probably would not have exercised those due process rights contained in Section §6335 et al, then it has not only voided a fundamental constitutional right, but done so on mere speculation. This is unsound reasoning.

The Petitioner, LaFonne Leeper has been damaged by this loss of opportunity. The amount of the damage is, in addition to the loss of her constitutional rights, the costs of this proceeding and the loss or the sale of her property.[3]

B. Congressional Intent

Over the years Congress has been also been vitally concerned about the power of the Internal Revenue Service to seize and sell the property of taxpayers and apply the proceeds to their tax liabilities. It has enacted a substantial number of laws designed to afford the taxpayer due process and to protect the value of their assets.[4]

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[2]Another problem with the court's opinion is it is speculative. The District Court speculates as to the action Petitioner LaFonne Leeper might have taken and what Petitioner Towner Leeper might have been thinking. But a Motion for Summary Judgment is to be considered in light of the facts most favorable to the respondent.

[3]The amount of the direct economic damages from the sale are known. The buyer testified that he paid the IRS $40,022 for the asset and immediately resold it "at wholesale" for $200,000. See Transcript at p. 77and Plaintiffs' original brief to the Fifth Circuit, p. 10, attached at Appendix H hereto.

[4]Though far too many in number to describe herein, there are several statutes specifically providing a number of due process rights. 26 U.S.C. §6335 alone covers several types of required notices and sale procedures. In addition, the IRS has promulgated dozens of operating regulations governing sales (Partial listing at Appendix H) including notice to the Taxpayer of the right to object to the minimum bid determination or request an engineer/appraiser, right to claim relief as innocent spouse under 26 U.S.C. §6015, and hardship relief under Delegation Order 11 (age, health, and financial distress).

Perhaps the best indication of Congress's thinking on the importance of the taxpayers due process rights is reflected in its Committee Reports:

> "The Committee believes that strengthening provisions regarding the minimum bid price, including preventing the Internal Revenue Service from selling the taxpayers property for less than the minimum bid price, are appropriate to preserve taxpayers rights."

This provision prohibits the Internal Revenue Service from selling seized property for less that the minimum bid price. The provision provides that the sale of property for less than the minimum bid price would constitute an unauthorized collection action, which would permit an affected person to sue for civil damages pursuant to Section §7433. S Report No. 105-174 (PL 105-206), page 84, Appendix F herein.

Still again, elsewhere in the same bill, the Committee adds:

> "The Committee believes that taxpayers are entitled to protections in dealing with the Internal Revenue Service that are similar to those they would have in dealing with any other creditor. Accordingly the Committee believes that the Internal Revenue Service should afford taxpayers adequate notice of collection activity and a meaningful hearing before the Internal Revenue Service deprives them of their property...(including) appropriate spousal defenses". S Report No. 105-174 (PL 105-206), Appendix F herein.

In the present case, the asset to be sold was a judgment lien against real estate. The Internal Revenue Service set a minimum bid equal only to the amount of taxes owed (and not the value of the property). This is hardly a coincidence,[5] and certainly further evidence of why Congress has minimum bid laws. Had Ms. Leeper received notice, she could have exercised her right to demand an appraisal by a qualified appraiser (See IRS Form 4585. Appendix G herein). Even had she been unsuccessful in disputing the valuation, (the $379,000 note was purchased for $40,022 and immediately resold by the buyer "at wholesale" for $200,000, Appendix I), she still could have asserted her rights as an innocent spouse to a corresponding half of the property sold. 26 U.S.C. §6015. While the Court found her testimony reflected total dependence on Towner Leeper, that same testimony also may form the basis of relief under any number of Internal Revenue Service collection provisions (26 U.S.C. §6015 & Internal Revenue Operational Manual 5.2.3.8 and Innocent Spouse Relief and Delegation Order 11 hardship relief). Appendix H.

C. Conclusion

The determination that a 72 year old housewife who has been deprived of her due process right to notice (and therefore the opportunity to exercise several fundamental due process rights) was nevertheless not injured because she probably couldn't have afforded to exercise those rights or otherwise may not have done anything had she received notice, is pure speculation and a fundamentally flawed analysis of constitutionally protected and fundamental due process rights.

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[5]The Summary Judgment granted to the IRS against LaFonne Leeper for 1995 related to withheld income taxes by a corporation, Towner Leeper P.C. Such funds were held in trust by the corporation. The alleged subsequent distribution between the IRS to and from the corporation was without her notice and should have no effect on the tax liability of the individual employee and their spouse - further damage due to lack of notice.

II. PETITIONER LAFONNE LEEPER WAS DEPRIVED OF HER PROPERTY IN VIOLATION OF HER 5TH AMENDMENT RIGHT TO DUE PROCESS.

The District Court found, and the Fifth Circuit Court of Appeals concurred, that the Internal Revenue Service recklessly and intentionally failed to give plaintiff LaFonne Leeper notice of sale of her interest in property as required by 26 U.S.C. §6335(b).

However, both courts determined that Petitioner LaFonne Leeper was not entitled to damages under Section §7443 since it was unlikely that she would have taken any action had she received that notice. Apparently she was poor and relied on her husband to handle tax matters.

The Fifth Amendment forbids the federal government from depriving persons of property without due process of law. Clearly LaFonne Leeper's community property ownership interest in the asset sold herein is such a protected property interest. *Mennonite Board of Missions v. Adams*, 462 U.S. 792 (1983) pg 798, and *Parrott v. Taylor*, 451 U.S. 527, 529 (1981) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

In *Verba v. Ohio Casualty Insurance Co.*, (1988, CA6, 851 F. 2d 811) the Sixth Circuit Court of Appeals determined that (constructive) notice satisfying 26 U.S.C. §6335(b) nevertheless did not comport with the requirements of procedural due process under the Fifth Amendment. As a result, the petitioner's interest in the property sold was not extinguished and the District Court's judgment granting the Internal Revenue Service's Motion for Summary Judgment was reversed.

This is in direct conflict with the Fifth Circuit below, which found that even though 26 U.S.C. §6335(b) had been violated, there were no damages.

Petitioner LaFonne Leeper respectfully requests the Supreme Court resolve this conflict among the Courts of Appeal.

CONCLUSION

This case is one of great importance. The Fifth Circuit has determined that a violation of the due process requirements of Section §6335(b) (notice) is harmless error and not actionable under Section §7433 if the court reasonably believes that notice would not have resulted in any different result. The Sixth Circuit has determined that any violation of procedural due process, even if it otherwise satisfied Section §6335(b), is a violation of the Fifth Amendment such that a significant property interest is not extinguished by a tax sale.

There are literally millions of property owners, innocent spouses, and impoverished taxpayers awaiting the results of this case.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-50839

[December 26, 2002, Filed]

TOWNER LEEPER; LA FONNE LEEPER,
Plaintiffs - Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,
Defendant - Appellee.

PETITION FOR REVIEW OF A DECISION
OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TEXAS, EL PASO

ON PETITION FOR REHEARING EN BANC

Before GARWOOD and CLEMENT, Circuit Judges, and RESTANI, Judge.*

PER CURIAM:

(X) Treating the Petition for Rehearing en Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

*Judge of the United States Court of International Trade, sitting by designation.

APPENDIX B

American Federal Tax Reports

LEEPER v. U.S., Cite as 90 AFTR 2d 2002-7053, 10/ 09/ 2002 , Code Sec(s) 6335; 7430; 7433

TOWNER LEEPER; LAFONNE LEEPER, PLAINTIFFS-APPELLANTS v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE.

Case Information:

Code Sec(s):	6335; 7430; 7433
Court Name:	U.S. Court of Appeals, Fifth Circuit,
Docket No.:	No. 01- 50839
Date Decided:	10/09/2002.
Prior History:	District Court, (2001, DC TX) 88 AFTR 2d 2001-5388, affirmed per curiam.
Tax Year(s):	Year 1995.
Disposition:	Decision for Govt.
Cites:	

HEADNOTE

1. Actions against U.S.—damages —unlawful collection —sale of seized property; notice —proof —administrative and litigation costs; prevailing party. District court properly granted govt. summary judgment on married taxpayers' Code Sec. 7433 claim: IRS's failure to give husband's attorney-in-fact proper notice of seizure and sale of lawsuit judgment under Code Sec. 6335 wasn't basis for suit where husband himself received actual notice; and wife wasn't damaged by IRS's failure to give her proper notice since she deferred decisions surrounding judgment's sale to husband. Also, taxpayers weren't entitled to administrative and

ligation costs as they weren't prevailing party. And, wife didn't show why she should be credited for withheld taxes or otherwise support her argument that her liability for 1 year was incorrectly calculated.
Reference(s): ¶ 74,335.01(10); 74,335.01(20); 63,355.01(5); 74,305.01(40) Code Sec. 6335; 7430; 7433

OPINION

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT,

Appeal from the United States District Court For the Western District of Texas (No. EP-98-CV-229-H)

Before GARWOOD and CLEMENT, Circuit Judges, and RESTANI, Judge.*

Judge: PER CURIAM.**

The district court's findings of fact were not clearly erroneous and it correctly granted summary judgment. We therefore AFFIRM.

[1] The I.R.S. must give a representative, such as Mr. Leeper's attorney-in-fact, notice of seizures and sales. 26 U.S.C. §6335; 26 CFR §601.506(a). Nevertheless, A failure to give notice or other written communication to the recognized representative of a taxpayer will not affect the validity of any notice or the written communication delivered to the taxpayer. 26 CAR§601.506(a)(3). The district court found Mr. Leeper received the notice required by §6335. Mr. Leeper points to no other statutory or regulatory violation to serve as a basis for his §7433 claim; he has no valid claim for damages, heart attack or otherwise.

The I.R.S. admitted violating §6335 with regards to Ms. Leeper. Nevertheless, the district court held Ms. Leeper was not damaged as a "proximate result" of

the lack of notice of sale for the Brown judgment, as she deferred decisions regarding the Brown judgment to her husband, Mr. Leeper. The Leepers attempt to bolster the importance of §6335 notice, and somehow avoid the language of §7433, by pointing to a pre-§7433 case, Reece v. Scoggins, 506 F.2d 967 [35 AFTR 2d 75-620] (5th Cir. 1975). This argument is unpersuasive. The dangers and policy articulated in Reece may well have been the motivating factor for the initial enactment of §7433 by Congress in 1988. In any event, the district court's finding on the "proximate results" issue is not clearly erroneous.

The Leepers seek administrative and litigation costs under §7430, which awards these costs to the prevailing party. §7430(a). The Leepers concede they are not a prevailing party under the district court's final judgment, and §7430 does not afford them recovery.

Ms. Leeper complains the district court erroneously determined her 1995 tax liability. Ms. Leeper failed to produce any evidence why she was entitled to a tax credit for the taxes withheld by Towner Leeper Attorney P.C.

AFFIRMED.

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* Judge of the United States Court of International Trade, sitting by designation.

** Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

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[1] The Leepers waived their entitlement to the costs of the action under §7433(b)(2) by failing to appeal it. Green v. State Bar of Texas, 27 F.3d 1083, 1089 (5th Cir. 1994).

APPENDIX C

American Federal Tax Reports

LEEPER v. U.S., Cite as 88 AFTR 2d 2001-5388, 07/ 20/ 2001 , Code Sec(s) 6335; 7433

TOWNER LEEPER and LAFONNE LEEPER, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT.

Case Information:
Code Sec(s): 6335; 7433
Court Name: U.S. District Court, Western Dist. of Texas,
Docket No.: Docket No. EP-98-CA- 229-H,
Date Decided: 07/20/2001.
Disposition: Decision for Govt.
Cites:

HEADNOTE

1. Actions against U.S.—damages —unlawful collection —sale of seized property; notice —proof. Govt. was granted judgment in tax attorney/former IRS employee's damages action regarding allegedly unlawful public auction sale of his seized property: taxpayer's claim that IRS agent willfully failed to properly notify him of sale date and time was belied by record, reflecting personal service on him of sale notice and other relevant documents. Also, fact that he didn't later sue to void sale further supported finding that he knew in advance, but decided not to oppose, sale; and although IRS intentionally or recklessly failed to notify wife pursuant to Code Sec. 6335(b) , she wasn't entitled to damages where she didn't contest sale after learning of it and didn't show she would have acted any differently if she

had advance notice, or that any damages resulted from lack thereof.
Reference(s): §74,335.01(10); 74,335.01(20); 63,355.01(5) Code Sec. 6335; 7433

OPINION

In the United States District Court for the Western District of Texas.
Judge: HUDSPETH, Senior District Judge:

This is a civil action for damages under 26 U.S.C. section 7433. In their complaint, the Plaintiffs allege that an officer of the Internal Revenue Service recklessly and intentionally disregarded provisions of the statutes and regulations in connection with an attempt to collect past due federal income taxes. The case was tried to the Court without a jury. The Court's findings of fact and conclusions of law are incorporated in this opinion.

This case is unusual if nothing else. One of the Plaintiff taxpayers (Towner Leeper) is both an attorney and a Certified Public Accountant. Furthermore, his entire professional career, which had spanned some forty years at the time of the incident in question in this case, had been devoted to the specialty of tax law. In fact, his first job out of law school was in the office of district counsel of the Internal Revenue Service in St. Louis, Missouri, and New Orleans, Louisiana. In 1960, he entered private practice in El Paso, Texas, a practice which he testified was devoted exclusively to tax law. Ironically, in the early 1990s, at a time when many attorneys are preparing for retirement, Mr. Leeper began to encounter his own personal income tax problems. He fell behind in the payment of [pg. 2001-5389] income taxes due and owing by himself and his spouse [1] and the Internal Revenue service began to assess tax deficiencies. In March, 1994, the Leeper account was assigned to a Revenue Officer for collection. The Revenue Officer first assigned to

the case on March 4, 1994, was James Haynes of the El Paso, Texas office of the Internal Revenue Service. On November 7, 1994, the case was reassigned to Revenue Officer Kelly Heick of the same office. Ms. Heick then proceeded with attempts to collect past due income taxes.

We now fast forward to the year 1996, in which the events crucial to this case occurred. In mid-1996, the past due income tax obligation of the Plaintiffs was approximately $39,000.00. In May, 1996, Ms. Heick learned that the Plaintiffs had sold their personal residence and realized gross proceeds of approximately $114,000.00. For some unknown reason, however, the Government's federal tax lien was not located by the title company, so the Plaintiffs' tax bill was not paid off (Defendant's Exhibit 6). Ms. Heick then demanded that the Plaintiff pay the past due income taxes in full, or she would proceed with some form of enforcement action. When full payment was not received, Ms. Heick focused her attention on one particular item of property possessed by the Plaintiffs, to wit: a judgment against Bruce Brown and in favor of Plaintiff Towner Leeper. It is Revenue Officer Heick's actions with respect to this judgment that give rise to this lawsuit.

At some time in the past, Towner Leeper had represented Bruce Brown in connection with a dispute with the Internal Revenue Service over Brown's tax liability. Later, Mr. Leeper sued Mr. Brown to collect his attorney's fees. On September 12, 1994, Mr. Leeper obtained a judgment against Mr. Brown in the amount of $248,229.50 (Plaintiff's Exhibit 1). The very first time that Ms. Heick contacted Mr. Leeper about payment of his back taxes on November 7, 1994, she was told that he was trying to collect on the judgment, and that he intended to pay his back taxes with these funds (Defendant's Exhibit 6). According to Mr. Leeper, the judgment had been recorded as a second lien on

a piece of unimproved real estate owned by the judgment debtor, Bruce Brown, near the intersection of North Loop Road and Zaragosa Road in El Paso County, Texas. Mr. Leeper was hoping that the land would be sold, and that the proceeds of the sale would be sufficient to pay his judgment in whole or in part. However, the land was not sold, and no funds were received by the Plaintiffs in satisfaction of the Bruce Brown judgment. Finally, in July, 1996, almost twenty months later, Ms. Heick decided to proceed with enforcement action with respect to the Bruce Brown judgment with the intention of applying the proceeds of its sale, if any, to the Plaintiffs' tax liability. Accordingly, on July 16, 1996, Ms. Heick proceeded to seize the judgment by filing a levy (IRS Form 668B) and a Notice of Seizure (IRS Form 2433) (Plaintiffs' Exhibits 15 and 13). On July 17, 1996, Ms. Heick proceeded to the office of Towner Leeper at 661 South Mesa Hills, El Paso, Texas, to serve copies of the forms 2433 and 668B on the taxpayer. Towner Leeper was not present in his office, so Ms. Heick left copies of the two forms with his son, John Leeper, also a practicing attorney.

It [sic] obvious that the documents left with John Leeper by Revenue officer Heick reached Towner Leeper, because on July 19, 1996, Towner Leeper filed an appeal from the proposed enforcement action (Plaintiffs' Exhibit 9). Ms. Heick was informed of the appeal by her group manager on July 23, 1996. Accordingly, her collection efforts were put on hold. For whatever reason, however, Towner Leeper did not follow up aggressively on his collection appeal. He did not return telephone calls from the group manager attempting to set up a conference regarding the appeal, or he returned the calls after hours and left messages on an answering machine. Frustrated, the group manager advised Ms. Heick on or about July 30, 1996, that the appeal was "closed".

On August 7, 1996, Ms. Heick and another Revenue Officer, Grace Torres, returned to the office of Towner Leeper. She took with her additional copies of the levy and Notice of Seizure which she had left in the Leeper law office the month before. She also brought with her two more documents, to-wit: a Notice of Public Auction Sale (IRS Form 2434) (Plaintiffs' Exhibit 20) and a minimum bid worksheet (IRS Form 4585) (Plaintiffs' Exhibit 7) This time, Ms. Heick met personally with the taxpayer, Towner Leeper, and served him with these four documents. The Notice of Public Auction Sale informed him that all of his right, title, and interest in and to the Bruce Brown judgment would be sold at public auction on August 22, 1996, at 10:00 a.m. Mr. Leeper inquired as to the status of his appeal, and Ms. Heick informed his that the appeal had been closed. According to Ms. Heick, she specifically called Mr. Leeper's attention to the date of the proposed public auction sale.

Prior to August 22, 1996, notices of the proposed auction sale were published in the El Paso Times, a daily newspaper of general circulation in El Paso County, Texas, and posted on the Internal Revenue Service bulletin board. When August 22 arrived the sale was held and the judgment was purchased by Cash investments, Inc. for $40,022.00. This sum was equal to the exact amount of the tax lien plus costs of sale. Apparently Towner Leeper was not represented at the auction sale.

On November 14, 1996, the Plaintiffs submitted an administrative claim for damages to the District Director of Internal Revenue in Austin, Texas. In this written claim, Towner Leeper denied that he had received advance notice of the proposed auction sale on August 22, 1996. Although he acknowledged having received the Notice of Seizure (Form 2433) and the minimum bid worksheet (Form 4585), he alleged that Ms. Heick has advised him that the sale date was "tentatively

set some time in September" (Plaintiffs' Exhibit 8). LaFonne Leeper also contended that she had received no advance notice of the auction sale (Plaintiffs' Exhibit 8). The Plaintiffs contended that the price paid for the Brown judgment at the auction sale was inadequate, resulting in economic damage to them. Towner Leeper also claimed that he sustained a heart attack in October, 1996, and that the attack was proximately caused by the improper collection activities of the Defendant's agents. Finally, the Plaintiffs alleged that the collection activities of Revenue Officer Kelly Heick were reckless and intentional. When their administrative claim met with no success, the Plaintiffs filed their complaint in the instant case.

[1] Under 26 U.S.C. section 7433, a taxpayer has the right to bring a civil action for damages against the United States if an officer or employee of the Internal Revenue Service in the process of collecting a tax recklessly or intentionally disregards any provision of the Internal Revenue Code or any regulation promulgated under the Code. Damages are limited, however, to actual, direct economic damages sustained by the plaintiff as a proximate result of the officer's reckless or intentional act. 26 U.S.C. section 7433(b)(1). In the instant case, the Plaintiffs contend that the intentional or reckless act of Revenue Officer Heick was the willful failure to give them notice of the date and time of the proposed auction sale of the Bruce Brown judgment.[2]

The Court finds as a fact that Plaintiff Towner Leeper did receive actual notice of the proposed auction sale. That notice was received by Mr. Leeper on August 7, 1996, when Revenue Officers Heick and Torres personally served him with a copy of the Form 2434, Notice of Public Auction Sale (Plaintiff's Exhibit 20) along with other relevant documents. For whatever reason, between August 7 and August 22, Mr. [pg. 2001-5391] Leaper made no attempt to

postpone or cancel the proposed auction sale, nor did he file an action after August 22 seeking to void the sale of the judgment. [3] According to the testimony of Towner Leeper, he learned of the auction sale in September, 1996. If that were true, he had plenty of time to file an action to void the auction sale before the judgment was resold to a third party. The fact that he took no such action is further evidence that he knew of the August 22 auction sale in advance.

Although a determination with regard to motive is certainly not essential to reaching a decision in this case, the following scenario might explain what happened here. On August 7, 1996, Towner Leeper was informed that the Bruce Brown judgment would be sold at auction on August 22. At that time, he did not possess sufficient funds to satisfy his income tax liability of almost $40,000.00. By the same token, he did not have the funds necessary to go to the auction and bid on the judgment himself, nor the ability to get some one else to attend the auction and offer a higher bid for the judgment. Furthermore, the Bruce Brown judgment probably had no value except to the extent that it operated as a second lien against a piece of real estate. Although the judgment had been obtained almost two years before, efforts to sell the land and satisfy the judgment, in whole or in part, had been unsuccessful. Since the judgment was but a second lien on unimproved real estate, it had no present cash or loan value. Mr. Leeper may have made a conscious decision to do nothing but wait and see if any bidder actually met the IRS minimum bid price at the auction sale. If the judgment were sold at the auction, his experience and detailed knowledge of the Internal Revenue Code undoubtedly made him aware of the possibility of a suit for damages under Section 7433.

The Court previously found in connection with the motion for summary judgment, and finds again

after hearing the evidence at trial, that Plaintiff LaFonne Leeper did not receive notice of the auction sale by means of personal service, certified mail, or otherwise. The Internal Revenue Service was clearly required by statute (26 U.S.C. section 6335(b)) to give her such notice. The Court further found, and finds again after trial, that IRS personnel recklessly or intentionally failed to comply with section 6335(b). The only remaining issue with respect to the claim of LaFonne Leeper under section 7433 is whether she is entitled to damages, and, if so, in what amount.

LaFonne Leeper testified in the trial of this case. Her testimony was that she received no advance notice of the proposed sale of the Bruce Brown judgment at public auction. She learned that the judgment had been sold Aa day or two@ after the sale. As of August 22, 1996, she admitted that she did not have sufficient funds available to satisfy her income tax liability for the year 1994. Significantly, she admitted that she left all decisions relating to their joint income tax liability and the methods of satisfying same to her husband, Towner Leeper. Upon learning of the sale of the judgment at public auction, she took no steps to set aside the judgment. Once again, she deferred to her husband, Towner Leeper. There in no evidence tending to show that LaFonne Leeper or Towner Leeper would have taken any different action had LaFonne received prior, independent notice of the proposed sale of the judgment at public auction.

This brings us to the question of whether LaFonne Leeper is entitled to recover damages. Section 7433 limits a plaintiff's recovery to the actual, direct economic damages sustained by the plaintiff as a proximate result of the IRS employee's reckless or intentional act or omission. 26 U.S.C. section 7433(b)(1). For the reasons just stated, Plaintiff LaFonne Leeper is unable to prove by a preponderance of the evidence that Revenue Officer

Heick's reckless disregard of her right to notice was a proximate cause of any damages. coins rain or come shine, LaFonne Leaper was going to leave all decisions and all action regarding their joint income tax liability to her husband, Towner Leeper. Giving her actual notice of the proposed auction sale in advance would not have changed anything.

It is therefore Ordered that judgment be, and it is hereby, Entered in favor of the Defendant, and that the Plaintiffs take nothing by their suit.

Signed and Entered this 19th day of July, 2001.
Harry Lee Hudspeth

Senior United States District Judge

*****

JUDGMENT

In accordance with the memorandum opinion and order this day entered in the above-styled and numbered cause,

It is Ordered, Adjudged and Decreed that judgment be, and it is hereby, Entered for the Defendant, and that the Plaintiffs take nothing by their suit. All costs herein incurred are taxed against the Plaintiffs, for all of which let execution issue.

Signed and Entered this 19th, day of July, 2001.

Harry Lee Hudspeth Senior United States District Judge

1

Towner Leeper was married to LaFonne Leeper, and they filed joint income tax returns. LaFonne Leeper is also a Plaintiff in this case.

2

In their pleadings, the Plaintiffs also contended that IRS employees violated statutes and/or regulations in (a) failing to give them notice of the minimum bid price; (b) selling the judgment to Cash Investments, Inc. for "grossly inadequate consideration"; and (c) selling the judgment while an appeal of the enforcement action was pending. Plaintiff LaFonne Leeper also contended that the IRS failed to inform her of the Notice of Seizure. The Court previously disposed of these contentions in the context of summary judgment. See: Order Regarding Plaintiff LaFonne Leeper's Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment, entered June 8, 1999.

3

As an attorney specializing in tax law, he was aware that a sale conducted without the required notice was void. Reece v. Scoggins, 506 F.2d 967 [35 AFTR 2d 75-620] (5th Cir. 1975).

APPENDIX D

Internal Revenue Code
§ 6335 Sale of seized property.

(a) Notice of seizure.
As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

(b) Notice of sale.
The Secretary shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a) , and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or, if there be no newspaper published or generally circulated in such county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and

the time, place, manner, and conditions of the sale thereof. Whenever levy is made without regard to the 10-day period provided in section 6331(a), public notice of sale of the property seized shall not be made within such 10-day period unless section 6336 (relating to sale of perishable goods) is applicable.

(c) Sale of indivisible property.
If any property liable to levy is not divisible, so as to enable the Secretary by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of such property shall be sold.

(d) Time and place of sale.
The time of sale shall not be less than 10 days nor more than 40 days from the time of giving public notice under subsection (b). The place of sale shall be within the county in which the property is seized, except by special order of the Secretary.

(e) Manner and conditions of sale.

(1) In general.

(A) Determinations relating to minimum price. Before the sale of property seized by levy, the Secretary shall determine—

(i) a minimum price below which such property shall not be sold (taking into account the expense of making the levy and conducting the sale), and

(ii) whether, on the basis of criteria prescribed by

the Secretary, the purchase of such property by the United States at such minimum price would be in the best interest of the United States.

(B) Sale to highest bidder at or above minimum price. If, at the sale, one or more persons offer to purchase such property for not less than the amount of the minimum price, the property shall be declared sold to the highest bidder.

(C) Property deemed sold to United States at minimum price in certain cases. If no person offers the amount of the minimum price for such property at the sale and the Secretary has determined that the purchase of such property by the United States would be in the best interest of the United States, the property shall be declared to be sold to the United States at such minimum price.

(D) Release to owner in other cases. If, at the sale, the property is not declared sold under subparagraph (B) or (C), the property shall be released to the owner thereof and the expense of the levy and sale shall be added to the amount of tax for the collection of which the levy was made. Any property released under this

subparagraph shall remain subject to any lien imposed by subchapter C.

(2) Additional rules applicable to sale.
The Secretary shall by regulations prescribe the manner and other conditions of the sale of property seized by levy. If one or more alternative methods or conditions are permitted by regulations, the Secretary shall select the alternatives applicable to the sale. Such regulations shall provide:

(A) That the sale shall not be conducted in any manner other than—

(i) by public auction, or

(ii) by public sale under sealed bids.

(B) In the case of the seizure of several items of property, whether such items shall be offered separately, in groups, or in the aggregate; and whether such property shall be offered both separately (or in groups) and in the aggregate, and sold under whichever method produces the highest aggregate amount.

(C) Whether the announcement of the minimum price determined by the Secretary may be delayed until the receipt of the highest bid.

(D) Whether payment in full shall be required at the time of acceptance of a bid, or whether a part of such payment may be deferred for such period (not to exceed 1 month) as may be determined by the Secretary to be appropriate.

(E) The extent to which methods (including advertising) in addition to those prescribed in subsection (b) may be used in giving notice of the sale.

(F) Under what circumstances the Secretary may adjourn the sale from time to time (but such adjournments shall not be for a period to exceed in all 1 month).

(3) Payment of amount bid.
If payment in full is required at the time of acceptance of a bid and is not then and there paid, the Secretary shall forthwith proceed to again sell the property in the manner provided in this subsection. If the conditions of the sale permit part of the payment to be deferred, and if such part is not paid within the prescribed period, suit may be instituted against the purchaser for the purchase price or such part thereof as has not been paid, together with interest at the rate of 6 percent per annum from the date of the sale; or, in the discretion of the Secretary, the sale may be declared by the Secretary to be null and void for failure to make full payment of

the purchase price and the property may again be advertised and sold as provided in subsections (b) and (c) and this subsection. In the event of such readvertisement and sale any new purchaser shall receive such property or rights to property, free and clear of any claim or right of the former defaulting purchaser, of any nature whatsoever, and the amount paid upon the bid price by such defaulting purchaser shall be forfeited.

(4) Cross reference.
For provision providing for civil damages for violation of paragraph (1)(A)(i) , see section 7433 .

(f) Right to request sale of seized property within 60 days.
The owner of any property seized by levy may request that the Secretary sell such property within 60 days after such request (or within such longer period as may be specified by the owner). The Secretary shall comply with such request unless the Secretary determines (and notifies the owner within such period) that such compliance would not be in the best interests of the United States.

(g) Stay of sale of seized property pending Tax Court decision.
For restrictions on sale of seized property pending Tax Court decision, see section 6863(b)(3).

APPENDIX E

Internal Revenue Code
§ 7433 Civil damages for certain unauthorized collection actions.

(a) In general.
If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432 , such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

(b) Damages.
In any action brought under subsection (a), or petition filed under subsection (e) upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of $1,000,000 ($100,000, in the case of negligence) or the sum of—

(1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent actions of the officer or employee, and

(2) the costs of the action.

(c) Payment authority.
Claims pursuant to this section shall be payable out of funds appropriated under

section 1304 of title 31, United States Code.

(d) Limitations.

(1) Requirement that administrative remedies be exhausted.
A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.

(2) Mitigation of damages.
The amount of damages awarded under subsection (b)(1) shall be reduced by the amount of such damages which could have reasonably been mitigated by the plaintiff.

(3) Period for bringing action.
Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the right of action accrues.

(e) Actions for violations of certain bankruptcy procedures.

(1) In general.
If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service willfully violates any provision of section 362 (relating to automatic

stay) or 524 (relating to effect of discharge) of title 11, United States Code (or any successor provision), or any regulation promulgated under such section, such taxpayer may petition the bankruptcy court to recover damages against the United States.

(2) Remedy to be exclusive.

(A) In general. Except as provided in subparagraph (B), notwithstanding section 105 of such title 11 , such petition shall be the exclusive remedy for recovering damages resulting from such actions.

(B) Certain other actions permitted. Subparagraph (A) shall not apply to an action under section 362(h) of such title 11 for a violation of a stay provided by section 362 of such title ; except that—

(i) administrative and litigation costs in connection with such an action may only be awarded under section 7430; and

(ii) administrative costs may be awarded only if incurred on or after the date that the bankruptcy petition is filed.

APPENDIX F

Committee Reports

COMREP ¶ 63,351.0098 Prohibition of sales of seized property at less than minimum bid. (IRS Restructuring and Reform Act of 1998, PL 105-206, 7/22/98)

Senate Report

Present Law

Section 6335(e) requires that a minimum bid price be established for seized property offered for sale. To conserve the taxpayer's equity, the minimum bid price should normally be computed at 80 percent or more of the forced sale value of the property less encumbrances having priority over the Federal tax lien. If the group manager concurs, the minimum sales price may be set at less than 80 percent. The taxpayer is to receive notice of the minimum bid price within 10 days of the sale. The taxpayer has the opportunity to challenge the minimum bid price, which cannot be more than the tax liability plus the expenses of sale. Accordingly, if the minimum bid price is set at the tax liability plus the expenses of sale, the taxpayer's concurrence is not required. IRM 56(13)5.1(4). Section 6335 does not contemplate a sale of the seized property at less than the minimum bid price. Rather, if no person offers the minimum bid price, the IRS may buy the property at the minimum bid price or the property may be released to the owner. Code section 7433 provides civil damages for certain unauthorized collection actions.

Reasons for Change

The Committee believes that strengthening provisions regarding the minimum bid price, including preventing the IRS from selling the taxpayer's property for less than the minimum bid price, are appropriate to preserve taxpayers' rights.

Explanation of Provision

The provision prohibits the IRS from selling seized property for less than the minimum bid price. The provision provides that the sale of property for less than the minimum bid price would constitute an unauthorized collection action, which would permit an affected person to sue for civil damages pursuant to section 7433.

Effective Date

The provision is effective for sales occurring after the date of enactment.

Conference Report

House Bill

No provision.

Conference Agreement

The conference agreement follows the Senate amendment.

E. PROTECTIONS FOR TAXPAYERS SUBJECT TO AUDIT OR COLLECTION ACTIVITIES

a. Due Process

a. Due process in IRS collection actions (sec. 3401 of the bill and new secs. 6320 and 6330 of the Code)

Present Law

Levy is the IRS's administrative authority to seize a taxpayer's property to pay the taxpayer's tax liability. The IRS is entitled to seize a taxpayer's property by levy if the Federal tax lien has attached to such property. The Federal tax lien arises automatically where (1) a tax assessment has been made; (2) the taxpayer has been given notice of the assessment stating the amount and demanding payment; and (3) the taxpayer has failed to pay the amount assessed within ten days after the notice and demand.

The IRS may collect taxes by levy upon a taxpayer's property or rights to property (including accrued salary and wages) if the taxpayer neglects or refuses to pay the tax within 10 days after notice and demand that the tax be paid. Notice of the IRS's intent to collect taxes by levy must be given no less than 30 days (90 days in the case of a life insurance contract) before the day of the levy. The notice of levy must describe the procedures that will be used, the administrative appeals available to the taxpayer and the procedures relating to such appeals, the alternatives available to the taxpayer that could prevent levy, and the procedures for redemption of property and release of liens.

The effect of a levy on salary or wages payable to or received by a taxpayer is continuous from the date the levy is first made until it is released.

If the IRS district director finds that the collection of any tax is in jeopardy, collection by levy may be made without regard to either notice period. A similar rule applies in the case of termination assessments.

Reasons for Change

The Committee believes that taxpayers are entitled to protections in dealing with the IRS that are similar to those they would have in dealing with any other creditor. Accordingly, the Committee believes that the IRS should afford taxpayers adequate notice of collection activity and a meaningful hearing before the IRS deprives them of their property. When collection of tax is in jeopardy, the Committee believes it is appropriate to provide notice and a hearing promptly after the deprivation of property. The Committee believes that following procedures designed to afford taxpayers due process in collections will increase fairness to taxpayers.

Explanation of Provision

The provision establishes formal procedures designed to insure due process where the IRS seeks to collect taxes by levy (including by seizure). The due process procedures also apply after the Federal tax lien attaches, but before the notice of the Federal tax lien has been given to the taxpayer.

As under present law, notice of the intent to levy must be given at least 30 days (90 days in the case of a life insurance contract) before property can be seized or salary and wages garnished. During the 30-day (90-day) notice period, the taxpayer may demand a hearing to take place before an appeals officer who has had no prior involvement in the taxpayer's case. If the taxpayer demands a hearing within that period, the proposed collection action may not proceed until the hearing has concluded and the appeals officer has issued his or her determination.

During the hearing, the IRS is required to verify that all statutory, regulatory, and administrative requirements for the proposed collection action have been met. IRS verifications are expected to include (but not be limited to) showings that:

(1) the revenue officer recommending the collection action has verified the taxpayer's liability;

(2) the estimated expenses of levy and sale will not exceed the value of the property to be seized;

(3) the revenue officer has determined that there is sufficient equity in the property to be seized to yield net proceeds from sale to apply to the unpaid tax liabilities; and

(4) with respect to the seizure of the assets of a going business, the revenue officer recommending the collection action has thoroughly considered the facts of the case, including the availability of alternative collection methods, before recommending the collection action.

The taxpayer (or affected third party) is allowed to raise any relevant issue at the hearing. Issues eligible to be raised include (but are not limited to):

challenges to the underlying liability as to existence or amount;

(2) appropriate spousal defenses;

(3) challenges to the appropriateness of collection actions; and

(4) collection alternatives, which could include the posting of a bond, substitution of other assets, an installment agreement or an offer-in-compromise.

Once the taxpayer has had a hearing with respect to an issue, the taxpayer would not be permitted to raise the same issue in another hearing.

The determination of the appeals officer is to address whether the proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the taxpayer that the collection action be no

more intrusive than necessary. A proposed collection action should not be approved solely because the IRS shows that it has followed appropriate procedures.

The taxpayer may contest the determination of the appellate officer in Tax Court by filing a petition within 30 days of the date of the determination. The Tax Court is expected to review the appellate officer's determination for abuse of discretion and also may consider procedural issues, as under present law. The IRS may not take any collection action pursuant to the determination during such 30 day period or while the taxpayer's contest is pending in Tax Court.

IRS Appeals would retain jurisdiction over its determinations. IRS Appeals could enter an order requiring the IRS collection division to adhere to the original determination. In addition, the taxpayer would be allowed to return to IRS Appeals to seek a modification of the original determination based on any change of circumstances.

In the case of a continuous levy, the due process procedures would apply to the original imposition of the levy. Except in jeopardy and termination cases, continuous levy would not be allowed to begin without notice and an opportunity for a hearing. A determination allowing the continuous levy to proceed that is entered at the conclusion of a hearing would be subject to post-determination adjustment on application by the taxpayer. Thus, taxpayers would have the right to have IRS Appeals review any continuous levy and take any changes in circumstances into account.

This provision does not apply in the case of jeopardy and termination assessments. Jeopardy and termination assessments would be subject to post-seizure review as part of the Appeals determination hearing as well as through any existing judicial procedure. A jeopardy or termination assessment must be approved by the IRS District Counsel responsible for the case. Failure to

obtain District Counsel approval would render the jeopardy or termination assessment void.

Effective Date

The due process procedures apply to collection actions initiated more than six months after the date of enactment.

APPENDIX G

Department he Treasury—Internal Revenue Service

Minimum Bid Worksheet

(991)

Revised

Taxpayer's name (from TDA)
Towner + Lafonne Leeper

2. Seizure number
96-611

Liability (including unassessed accrued amounts)	$ 39,555.81	
1. Estimated expenses of sale (from Form 2433)	$ 200.00	Amount
5. Property value (from Form 2433)		$ 25,000.00
6. Property value reduction (not to exceed 25%)	25 %	$ 6250.00
7. Forced sale value (Line 5 minus Line 6)		$ 18,750.00
8. Percentage of forced sale value (normally 20%)	20 %	$ 3750.00
9. Reduced forced sale value (Line 7 minus Line 8)		$ 15,000.00

10. Prior Claims
(from Form 3434-B; get District Counsel opinion when necessary)

Name and Address of Claimant	Type of Claim	Date Recorded	Balance Due/Date Verified
None			$ -0-

11. Total of prior claims ▶	-0-
12. MINIMUM BID PRICE (Line 9 minus Line 11)	$ 15,000.00

13. Explain how the fair market value was determined.
Consultation with local investors in paper resulted in value determination based on underlying assets + risk of collection.

14. Remarks (Explain the basis for the percentage reductions used. For revised minimum bids, explain the reason for the revision.)

6. Property value reduction of 25% taken due to uncertainty of collectibility of judgement.

8. Forced sale value reduction of 20% taken due to risky nature of investment.

PLAINTIFF'S EXHIBIT 7

GOV0039

15. Revenue Officer's signature Kelly Heick		Date 7-18-96
16. Approval signature Acting Group Manager	Title ACTING Group Manager	Date 7-18-96

Part 1-TDA Copy (Remove carbon before completing items on back of Part 3) Form 4585 (Rev.

BEST AVAILABLE COPY

IRS Form 4585 (also Plaintiffs' Exhibit 7)

Internal Revenue Service
District Director

Department of the Treasury

Date: _____

Social Security or
Employer Identification Number:

In Reply Refer to:

Person to Contact:

Contact Telephone Number:

THIS FORM IS FOR INTERNAL USE ONLY.
DO NOT FILE.

The minimum bid worksheet on the back shows how we figured the minimum bid price for the seized property. The minimum bid price is established to protect your interest in the property. It reflects the lowest amount we will accept for that property at our sale. However, the minimum bid cannot be more than your tax liability plus the expenses of the seizure and sale.

If you do not agree with the values used to determine the minimum bid amount, you may request a valuation engineer from the IRS, if one is available, or a professional appraiser, acceptable to both you and the IRS, to re-evaluate the figures used. If the values recommended by the valuation engineer or the professional appraiser are unacceptable, a second appraisal can be requested. We will then use both appraisals to re-figure the value of the property. The appraisal costs are to be paid by you and may be made part of the expenses of levy and sale and added to your tax liability.

If we do not hear from you within 10 days from the date shown above, we will assume you agree with the established minimum bid price. If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,

Revenue Officer

(Reverse side of Part 3 - Taxpayer's Copy)

JSA

0940320 2.000

Form 4585 (Rev. 6-91)

IRS Form 4585 (also Plaintiffs' Exhibit 7)

Form 4585 (Rev. June 1991)	Department of the Treasury - Internal Revenue Service **Minimum Bid Worksheet**	☐ Initial ☐ Revised
1 Taxpayer's name (from TDA)		2 Seizure number

3 Liability (including unassessed accrued amounts)	$	
4 Estimated expenses of sale (from Form 2433)	$	Amount
5 Property value (from Form 2433)		$
6 Property value reduction (not to exceed 25%)	____ %	$
7 Forced sale value (Line 5 minus Line 6)		$
8 Percentage of forced sale value (normally 20%)	____ %	$
9 Reduced forced sale value (line 7 minus Line 8)		$

Prior Claims

10 (from Form 2424-B, get District Counsel opinion when necessary)

Name and Address of Claimant	Type of Claim	Date Recorded	Balance Due/Date Verified
			$

THIS FORM IS FOR INTERNAL USE ONLY.
DO NOT FILE.

11. Total of prior claims	▶	
12. MINIMUM BID PRICE (Line 9 minus Line 11)		$

13 Explain how the fair market value was determined.

14 Remarks (Explain the basis for the percentage reductions used. For revised minimum bids, explain the reason for the revision.)

15 Revenue Officer's signature		Date
16 Approval signature	Title	Date

Part 1 - TDA Copy [Remove carbon before completing letter on back of Part 3] Form 4585 (Rev. 6-91)

IRS Form 4585 (also Plaintiffs' Exhibit 7)

APPENDIX H

Internal Revenue Manual

5.10.4.6 — Establishment of the Minimum Bid

[Last Revised: 01-01-2003]

(1) IRC 6335 requires that a minimum bid price be established for seized property offered for sale. The minimum bid price will be fixed by the PALS in charge of the sale. The primary purpose of establishing a minimum bid price is to avoid selling the property at substantially less than the forced sale value of the taxpayer's interest in the property.

(2) The minimum bid price must be correctly determined to provide for the equitable preservation of both the taxpayer's interest and the government's interest in the property.

(3) Form 4585, Minimum Bid Worksheet, is used in determining the minimum bid price (Exhibit 5.10.4-1). The fair market value on Form 2433 is the starting point for the calculation. This value should have been previously determined in the draft minimum bid and in the preparation of Form 2433. The basis for how the fair market value was determined must be documented in Item 13 of Form 4585.

(4) If facts not known at the time of the seizure justify a change to the property value, it is not necessary to adjust the amounts on Form 2433 for accounting control purposes; however, the reason an adjusted figure is used as a basis for computing the minimum bid price should be fully explained in the history. Differences between the draft minimum bid and the actual minimum bid should also be

documented in the case history by the PALS and communicated to the revenue officer.

(5) A property value reduction, not to exceed 25%, should then be taken in order to determine the forced sale value. This reduction is taken in order to reflect the fact that the sale is a forced sale of the property - it is not taking place between a willing seller and a willing buyer. The difficulties associated specifically with a forced government sale, such as no guarantee of clear title, property sold "as is, where is", and no warranty on the property, should also be considered when determining this percentage. The basis for the percentage reduction must be documented in Item 14 of Form 4585.

(6) The forced sale value may then be reduced by a maximum of 20% in order to determine the reduced forced sale value. The reasons for the percentage reduction must also be documented in Item 14 and should be determined by:

Past experience at sales for the type of property seized
The possibility that senior lienholders may foreclose on the seized property
How the property is titled and if there are other owners of record
Whether the purchaser will have to re-negotiate prior encumbrances
The effect the redemption period has on finding willing buyers
Whether conditional financing is available
Whether the property is subject to conditional sale procedures
Any other factors that might depress the value of the property (possible attempts by the taxpayer to disrupt sale, etc.) at the sale

(7) The percentage reductions selected should be based on the facts of the case and should not always reflect the maximum allowable reductions. The

reasons for the percentage reductions must be documented on Form 4585.

(8) All encumbrances from Form 2434-B that are senior to the first NFTL should then be listed in Item 10. The total of all prior claims should then be subtracted from the reduced forced sale value to arrive at the minimum bid price.

(9) The minimum bid price, in all instances, will be limited to an amount not to exceed the tax, penalty, interest, lien fees, expenses of levy and sale, and other charges, which represent the Government's lien interest in the seized property (See IRM 1.2.1, Policies of the IRS, P-5-35(1)). If this is the basis for the minimum bid, it must be documented in Item 14.

(10) The minimum price for securities traded on the New York Stock Exchange, the American Stock Exchange, regional exchanges, or the National Association of Securities Dealers Automated Quotation System (NASDAQ) will be fixed at not less than 95% of the closing market price as of the day preceding the sale (See IRM 1.2.1, Policies of the IRS, P-5-35(2)). When stocks are involved, enter *** in Item 12 of Form 4585, and write an explanation that the minimum bid will be 95% of the closing price of the stock on the day before the sale. Form 4585 must still be delivered to the taxpayer, but the taxpayer may not dispute the minimum bid under these circumstances.

(11) The minimum bid price for precious metals that are traded by weight on the New York Mercantile Exchange should be set at 80% of the spot price per troy ounce as of the day preceding the sale. For coins that are identifiable, the appropriate percentage should be 95%. When these types of assets are involved, enter *** in Item 12 of Form 4585, and write the appropriate explanation that the minimum bid will be 80% or 95% of the spot price

per troy ounce as of the day preceding the sale. Form 4585 must still be delivered to the taxpayer, but the taxpayer may not dispute the minimum bid under these circumstances. The Service will not guarantee the weight or purity of the gold or silver.

5.10.4.6.1 — Decision to Bid In the Property for the Government

[Last Revised: 01-01-2003]

(1) Under IRC 6335(e), if the minimum bid price is not reached by bidders at the sale, the Service may purchase the property for the minimum price if it is in the best interest of the government to do so. It is important that the minimum bid price be correctly determined since the taxpayer receives credit on the account for the amount of the minimum bid price, less expenses of levy and sale, when the property is declared purchased for the United States.

(2) The decision whether or not to bid in the property for the government must be made no later than the day before the scheduled sale and must be documented in the case history. In determining when it is in the best interest of the government to bid in property, the PALS should consider the following factors:

Marketability of the property
Cost of maintaining the property
Cost of repairing or restoring the property
Cost of transporting the property
Cost of safeguarding the property
Cost of potential toxic waste cleanup
Other factors pertinent to the type of property

(3) If the decision is made not to bid in the property for the government, the property will be released to the taxpayer if the minimum bid is not offered by a

potential buyer at the original sale or, if applicable, at a subsequent sale if the original sale is adjourned (IRM 5.10.5.3).

5.10.4.6.2 — Delivery of Form 4585, Minimum Bid Worksheet

[Last Revised: 01-01-2003]

(1) The completed Form 4585 will be submitted to the manager of the PALS for concurrence prior to giving public notice of sale.

(2) After approval of the minimum bid is secured, the PALS will complete the reverse of Part 3 of Form 4585 and will deliver the form to the taxpayer in order to advise the taxpayer of the minimum bid price and the basis for computation. To ensure proper delivery of Form 4585, the PALS must attempt to deliver this form to the taxpayer's place of abode or business if the taxpayer has such within the territory where the PALS is located. If the taxpayer's residence or business cannot be readily located or the taxpayer has no residence or business within the territory where the PALS is located, Form 4585 must be sent to the taxpayer's last known address by certified mail, return receipt requested, and by regular mail. Document the case history as to the date and method of delivery. When a third party, rather than the taxpayer, is the owner of the property, then Form 4585 must be delivered under the above guidelines to the owner of the property. The taxpayer should receive a copy of the Form 4585, but any references to the 10-day appeal timeframes should be deleted. The owner of the property is entitled to appeal the minimum bid, not the taxpayer.

(3) A copy of Form 4585 must be forwarded to Technical Support within 10 workdays after the copy is provided to the taxpayer.

5.10.4.6.3 — Challenges to the Minimum Bid

[Last Revised: 01-01-2003]

(1) The taxpayer/owner has 10 days to respond to the minimum bid. Delivery should normally be prior to giving the public notice of sale to permit ample time to finalize the minimum bid price before the sale date. If the taxpayer/owner does not respond within the 10 day waiting period, no further action is required.

(2) The minimum bid price cannot be more than the tax liability plus expenses of sale (See IRM 1.2.1, Policies of the IRS, P-5-35), and the minimum price for securities traded on the New York Stock Exchange, the American Stock Exchange, regional exchanges, or the National Association of Securities Dealers Automated Quotation System (NASDAQ) will be fixed at not less than 95% of the closing market price as of the day preceding the sale (See IRM 1.2.1, Policies of the IRS, P-5-35(2)). Therefore, when the minimum bid price is established by following these provisions, agreement is not required and a request for reevaluation will not be considered.

5.10.4.6.4 — PALS Agrees Fully With Challenge to Minimum Bid

[Last Revised: 01-01-2003]

(1) If the taxpayer/owner responds with new information regarding the property value and the PALS agrees totally with the information, the PALS should revise the minimum bid. The reasons for revision should be indicated under Item 14 of the revised Form 4585.

(2) The revised minimum bid should be delivered under the same provisions as the original minimum bid (IRM 5.10.4.6.2(2)) or it may be faxed to the

taxpayer/owner if there has been personal contact with the taxpayer or Power of Attorney to discuss the revised minimum bid. The reference to the ten days in which to protest the minimum bid should be deleted from the reverse of Form 4585. A copy should be forwarded to Technical Support within 10 workdays of delivery to the taxpayer/owner. If, after reviewing the additional information, the PALS determines the sale is no longer expected to result in any net proceeds, the property must be released.

(3) Under these circumstances, the taxpayer/owner does not have an additional opportunity to dispute the revised minimum bid, and there is no requirement to wait an additional ten days.

5.10.4.6.5 — PALS Agrees Partially With Challenge to Minimum Bid

[Last Revised: 01-01-2003]

(1) If the taxpayer/owner responds with new information regarding the property value and the PALS only partially agrees with the information, the PALS should revise the minimum bid based on his or her analysis of the information submitted. The reasons for revision should be indicated under Item 14 of the revised Form 4585.

(2) The revised minimum bid should be delivered under the same provisions as the original minimum bid (IRM 5.10.4.6.2(2)). A copy should be forwarded to Technical Support within 10 workdays of delivery to the taxpayer.

(3) If the taxpayer/owner agrees with the revised minimum bid and is willing to waive the 10 day waiting period, a written statement and the taxpayer/owner's signature should be secured on the revised form and the case should be documented. If the signature is not secured,

document the case history accordingly and allow the 10 day waiting period to expire. Concurrence with the minimum bid is only required when the minimum bid will be used before the 10 day period the taxpayer/owner would normally have to respond to the minimum bid determination expires.

(4) A copy of the taxpayer/owner's concurrence with the minimum bid, when required, will be forwarded to Technical Support to be included in the seizure file. The taxpayer/owner's written signature and statement that they are waiving the 10 day waiting period on Form 4585 should suffice as concurrence when revising the minimum bid.

(5) If the taxpayer/owner does not respond to the revised minimum bid within the 10 day waiting period, no further action is required.

5.10.4.6.6 — PALS Disagrees With Challenge to Minimum Bid

[Last Revised: 01-01-2003]

(1) If the taxpayer/owner responds with new information and the PALS does not change the minimum bid based on the information presented, the taxpayer/owner should be advised to secure the services of an independent appraiser, acceptable to the Service and the taxpayer. If the taxpayer/owner does not secure an acceptable appraiser within a reasonable time period (usually 10 days) the PALS may choose an outside appraiser. An Internal Revenue Service Valuation Engineer or Appraiser may be used when feasible and available.

(2) If the professional appraiser or valuation engineer recommends a forced sale value unacceptable to the taxpayer/owner (the value may be provided to the taxpayer either verbally or through a revised Form 4585), the services of another appraiser may be secured with an average

of both appraisals being used to re-compute the value of the property.

(3) If the revised minimum bid is based on an average of the two appraisals, the taxpayer/owner does not have an additional opportunity to dispute the minimum bid and there is no requirement to wait an additional ten days. The revised minimum bid should be delivered under the same provisions as the original minimum bid or it may be faxed to the taxpayer/owner if there has been personal contact with the taxpayer/owner or Power of Attorney to discuss the revised minimum bid. The reference to the ten days in which to protest the minimum bid should be deleted from the reverse of Form 4585. A copy should be forwarded to Technical Support within 10 workdays of delivery to the taxpayer/owner. If, after reviewing the additional information, the PALS determines the sale is no longer expected to result in any net proceeds, the property must be released.

(4) The cost of obtaining the services of private appraisers may be paid directly by the taxpayer or may be made a part of the expenses of levy and sale to be charged to the account via TC 360.

5.10.4.6.7 — Revised Minimum Bid Forms — No Opportunity to Protest

[Last Revised: 01-01-2003]

(1) If the minimum bid form is being revised for any of the following reasons, the taxpayer/owner does not have an additional opportunity to protest the minimum bid and the reference to the 10 days within which to submit a protest should be deleted from the reverse of Form 4585:

- Additional encumbrances were located
- Balances due on encumbrances are being adjusted or updated

Some of the seized property was released and reductions are being made to the fair market value based on the released assets (see IRM 5.10.4.5(14)) If any changes are being made to the reduction percentages in addition to the changes above, then the taxpayer/owner must be allowed the opportunity to protest the revised minimum bid.

September." (Transcript pages -146-147)

"Prior to August 22, 1996, notices of the proposed auction sale were published in the el Paso Times, a daily newspaper of general circulation in El Paso County, Texas, and posted on the Internal Revenue Service bulletin board. When August 22 arrived the sale was held and the judgment was purchased by Cash Investment, Inc. for $40,022.00. This sum was equal to the exact amount of the tax lien plus the costs of sale. Apparently Towner Leeper was not represented at the auction sale." (Opinion page 5)

The buyer Cash Investments was represented by Richard Aguilar who testified of learning of the sale of the judgment by publication and being familiar with the underlying property, researched the title and concluded the property would easily generate a $300,000 profit. (Transcript pages 72-73) Aguilar was the sole bidder at the sale and was told he could buy the property for the amount owed the I.R.S. by the Leepers. (Transcript page 75) Aguilar paid the I.R.S. $40,000 and sold the judgment "at wholesale" for $200,000 within two weeks. (Transcript pg 77)

Towner Leeper appointed Sam Creighton his attorney-in-fact on December 12, 1994, executing Form 2848, for the fiscal years 1992, 1993, and 1994 and directed that all notices be sent to Creighton. (Plaintiff's Exhibit 2). No notice of sale of the Bruce Brown judgment was ever sent to Creighton (Heick testimony, Transcript pages 39-42; Crieghton testimony, transcript pages 132-133)

Supreme Court, U.S.
FILED
JUN 12 2003
OFFICE OF THE CLERK

No. 02-1537

In the Supreme Court of the United States

TOWNER LEEPER AND LAFONNE LEEPER,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether petitioners may recover damages against the United States under Section 7433 of the Internal Revenue Code when they failed to show that they sustained "actual, direct economic damages * * * as a proximate result of" (26 U.S.C. 7433(b)(1)) the unlawful acts of a revenue officer.

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TOWNER LEEPER AND LAFONNE LEEPER,
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COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-7a) is not published in the *Federal Reporter* but is *re-*

[1] Petitioners have misstated the caption of this case. This suit was brought against the United States, not against the Commissioner of Internal Revenue. Pet. App. 8a. While the statute on which petitioners rely authorizes "a civil action for damages against the United States" (26 U.S.C. 7433(a)), it authorizes no recovery against any other party.

printed in 51 Fed. Appx. 928. The opinion of the district court (Pet. App. 8a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2002. The petition for rehearing was denied on December 26, 2002. The petition for a writ of certiorari was filed on March 25, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Towner Leeper is an attorney and a certified public accountant. He had practiced tax law for forty years at the time of the incidents involved in this case. Petitioner LaFonne Leeper is his wife. Pet. App. 9a, 16a.

During 1996, petitioners owed past-due federal income taxes of approximately $39,000. Pet. App. 10a. After several unsuccessful efforts to obtain payment of those taxes from Mr. Leeper, an internal revenue officer levied upon and seized a judgment that Mr. Leeper had obtained against a former client. *Ibid.* After being served with the notice of seizure, Mr. Leeper filed an administrative appeal, which he subsequently abandoned. *Id.* at 11a.

After the administrative appeal was abandoned, the revenue officer caused a notice of the public auction of the judgment to be served personally on Mr. Leeper on August 7, 1996. That notice listed the date of the proposed sale as August 22, 1996, at 10:00 a.m., and set forth a required minimum bid of $15,000. Pet. App. 12a, 13a, 34a.[2] Mr. Leeper made no attempt to postpone or

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[2] Petitioners' contention (Pet. 9) that the minimum bid was based on the amount of tax due rather than on the value of the property is not supported by the record. Petitioners owed approxi-

cancel the proposed sale. *Id.* at 13a-14a. Mrs. Leeper was not separately served with the notice of sale or notice of minimum bid. *Id.* at 15a.

At the sale held on August 22, 1996, the judgment was purchased by Richard Aguilar of Cash Investments, Inc. for $40,022, more than twice the minimum bid amount. Pet. App. 12a; 6/16/99 Tr. 52, 76.[3] Petitioners lacked funds to bid at the sale and were not represented at the sale. Pet. App. 12a, 14a-15a. Although Mr. Leeper had prior notice of the sale, petitioners took no steps to invalidate the sale. *Id.* at 14a-15a. Approximately two months after the tax sale, Mr. Aguilar sold the judgment for $200,000, payable over the course of a year. 6/16/99 Tr. 76-79.

2. In 1998, petitioners filed this suit against the United States under 26 U.S.C. 7433 to recover damages that they allegedly sustained as a result of the failure of the revenue officer to make personal service on Mrs. Leeper. The district court held (i) that Mrs. Leeper was a co-owner of the judgment sold at the tax sale under Texas community property law and (ii) that the revenue officer's failure to give her separate notice of the sale violated the requirement of 26 U.S.C. 6335(b) that each "owner" of the property be given notice of sale. Pet. App. 15a. The court nonetheless held that

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mately $39,000 at the time the minimum bid price was established, not $15,000. Pet. App. 10a. The evidence established that the revenue officer based the value of the property on information she received from local investors and then made appropriate adjustments for uncertainty of collecting the judgment and for the forced nature of the sale. 6/16/99 Tr. 26-28; Pet. App. 34a.

[3] "R." references are to the numbered volumes and page numbers of the original record on appeal as repaginated by the Clerk of the district court. "Tr." references are to the two volumes of the transcript of the trial held on June 16-17, 1999.

petitioners were not entitled to damages because they were "unable to prove by a preponderance of the evidence that" this violation of Section 6335 "was a proximate cause of any damages." Pet. App. 15a-16a.

3. The court of appeals affirmed. Pet. App. 4a-7a. The court held that the district court was "not clearly erroneous" in finding that petitioners failed to establish any actual damages as a proximate result of the failure to serve Mrs. Leeper with notice of the sale. *Id.* at 6a.

In a petition for rehearing, petitioners argued for the first time that the failure to give separate notice of the tax sale to Mrs. Leeper violated her constitutional right to the due process of law. The court of appeals denied the rehearing petition without comment. Pet. App. 2a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Section 7433(a) of the Internal Revenue Code, as in effect during the years relevant to this case, provides a cause of action for damages against the United States "[i]f, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title." 26 U.S.C. 7433(a) (1994). In such an action, a taxpayer may recover "actual, direct economic damages sustained" as a proximate result of the employee's wrongful conduct up to a limit of $1,000,000. 26 U.S.C. 7433(b).[4]

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[4] 26 C.F.R. 301.7433-1(b)(1) defines "actual, direct economic damages" for this purpose as follows:

This Court has stated that the "correct measure of damages" for an economic loss is generally "the difference between the fair value of all that the [plaintiff] received and the fair value of what he would have received had there been no [wrongful] conduct." *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 155 (1972). See *Randall* v. *Loftsgaarden*, 478 U.S. 647, 661-662 (1986). Applying this general principle to Section 7433(b), the measure of "economic damages sustained" in this case would be the excess of (i) what petitioners *would* have received at the tax sale if the revenue officer had given notice of that sale to Mrs. Leeper (as well as to Mr. Leeper) over (ii) what was actually received at that sale.[5]

Mrs. Leeper testified, however, that she left all decisions about tax matters to her husband and that she

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Actual, direct economic damages are actual pecuniary damages sustained by the taxpayer as the proximate result of the reckless or intentional actions of an officer or an employee of the Internal Revenue Service. Injuries such as inconvenience, emotional distress and loss of reputation are compensable only to the extent that they result in actual pecuniary damages.

[5] Even if damages occurred, they would be recoverable under this statute only if they were the "proximate result" of the failure to give such notice to Mrs. Leeper, as well as to Mr. Leeper. 26 U.S.C. 7433(b)(1). The term "proximate result" is borrowed from the tort law concept of "proximate cause." A demonstration of proximate cause requires a showing that the conduct complained of "was a substantial contributing factor in bringing about the harm alleged." *Robertson* v. *Allied Signal, Inc.*, 914 F.2d 360, 366-367 (3d Cir. 1990). Thus, once the taxpayer has made a showing of a violation of the Code or regulations, she must next demonstrate (i) that she incurred damages that "but for" the violation would not have incurred and (ii) that the violation was "a substantial contributing factor" to those damages. See *Information Resources, Inc.* v. *United States*, 996 F.2d 780, 784-785 (5th Cir. 1993).

would not have taken any action even if she had received notice. 6/17/99 Tr. 184-185; Pet. App. 15a. She further testified that, even though she learned of the sale of the judgment a day or two after the sale, she took no steps to set aside the sale. 6/17/99 Tr. 184; Pet. App. 15a. The district court properly concluded from this testimony (and from the fact that Mr. Leeper also took no steps to prevent or set aside the sale) that Mrs. Leeper was "unable to prove by a preponderance of the evidence that [the revenue officer's] reckless disregard of her right to notice was a proximate cause of any damages." Pet. App. 15a-16a.[6]

2. Petitioners err in asserting (Pet. 6-7) that the decision in this case conflicts with decisions from other circuits. Indeed, in the only other appellate decision directly on point, the Third Circuit similarly held in *Kabakjian* v. *United States*, 267 F.3d 208, 213 (2001), that taxpayers who had not suffered damages from a violation of the notice provisions of 26 U.S.C. 6335 could not recover damages for that violation under 26 U.S.C. 7433. In *Kabakjian*, a revenue officer served taxpayers with notices of seizure and sale by certified mail, rather than in person as required by 26 U.S.C. 6335. 267 F.3d at 210-211. The Third Circuit held that taxpayers could not recover damages under 26 U.S.C. 7433 in that case, however, because "[t]hey did not show 'actual, direct economic damages sustained' as a 'proximate result' of the technical noncompliance with the statutory notice requirements." 267 F.3d at 214. The reasoning and

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[6] Petitioners' description of this reasoning as "pure speculation" (Pet. 9) is contradicted by their acknowledgment (Pet. 5-6) that the district court's conclusion was based on Mrs. Leeper's own testimony.

holding of *Kabakjian* thus directly supports the conclusion of the court of appeals in this case.

The cases on which petitioners rely for an asserted conflict among the circuits (Pet. 6) are inapposite. Although the taxpayers in *Goodwin* v. *United States*, 935 F.2d 1061, 1065 (9th Cir. 1991), and *Kulawy* v. *United States*, 917 F.2d 729 (2d Cir. 1990), sought a remedy for violations of the tax sale notice provisions of 26 U.S.C. 6335, those suits were brought under 28 U.S.C. 2410 (not under 26 U.S.C. 7433) and they sought only equitable relief, not damages. Section 2410 provides a waiver of sovereign immunity for taxpayers to challenge the procedural validity of a tax lien that the government claims on property to which taxpayers seek to quiet title. *Goodwin*, 935 F.2d at 1064; *Kulawy*, 917 F.2d at 733. In an action under Section 2410, the only relief available is "equitable relief affecting title," not damages. *Kulawy*, 917 F.2d at 736. In order to receive equitable relief under 28 U.S.C. 2410, a taxpayer need not show any actual prejudice from the procedural defect. *Goodwin*, 935 F.2d at 1065; *Kulawy*, 917 F.2d at 735. In contrast, before damages may be awarded under 26 U.S.C. 7433, the taxpayers must establish that they suffered "actual, direct economic damages * * * as a proximate result" of the government's action. 26 U.S.C. 7433(b)(1). The cases that afford equitable relief under Section 2410 are thus inapposite to the present case because they do not consider, and do not apply, the entirely different and specific textual restrictions on awards of damages under Section 7433 of the Internal Revenue Code.[7] See *Kabakjian*, 267 F.3d at 213.

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[7] In *Goodwin* and *Kulawy*, the courts of appeals held that, for the purpose of seeking equitable relief under 28 U.S.C. 2410, a

Petitioners also err in asserting that the holding that "there were no damages" (Pet. 10) in this case conflicts with the decision of the Sixth Circuit in *Verba* v. *Ohio Casualty Ins. Co.*, 851 F.2d 811 (1988). In *Verba*, an individual who purchased property at a federal tax sale brought suit to set aside a judgment lien on the property that was junior to the tax lien. The district court granted relief to the purchaser, but the court of appeals reversed. Applying the decision of this Court in *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791 (1983), the court of appeals held that the notice given to the junior lien holder was constitutionally inadequate and that the tax sale therefore did not extinguish the junior lien. 851 F.2d at 816. The issue addressed in *Verba* did not involve, and the court in that case did not address, the parameters of a cause of action for damages under 26 U.S.C. 7433. That decision is thus plainly inapposite to this case.[8]

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merely technical violation of the notice provisions of 26 U.S.C. 6335 is a sufficient procedural irregularity to permit an equitable challenge to the seizure and sale of a taxpayers' property. *Goodwin*, 935 F.2d at 1065; *Kulawy*, 917 F.2d at 734, 736. In the present case, the district court similarly concluded that a technical failure to comply with the notice requirements of Section 6335—serving only one of the two affected spouses–was sufficient to establish a violation that could permit a claim for damages to proceed. Pet. App. 14a-15a. That holding was impliedly accepted without comment by the court of appeals in this case (*id.* at 5a-6a), and plainly does not conflict with *Goodwin* and *Kulawy*, as petitioners erroneously contend (Pet. 6-7).

[8] Petitioners seek to advance a new claim (Pet. 10) that the failure to notify Mrs. Leeper of the tax sale violated her right to due process. Petitioners first sought to raise this claim in their petition for rehearing, which the court of appeals declined to address. See page 4, *supra*. That claim is therefore not properly before the Court, for this Court "ordinarily 'do[es] not decide in the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2003

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first instance issues not decided below.'" *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (quoting *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999)).

(3)

NO. 02-1537

Supreme Court, U.S.
FILED
JUL 2 _ 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

TOWNER LEEPER & LAFONNE LEEPER,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

Cases

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ARGUMENT

Respondent's brief is noteworthy not for what is says, but what it doesn't say.

As we go through Respondent's brief, please note that Respondent does not dispute that the due process requirements of notice in 26 USC 6335(b) were recklessly and willfully denied Petitioner Lafonne Leeper. This is a critical admission as Respondent's

objections are made with unclean hands. With this in mind, we now turn to Respondent's brief directly:

1. Damages

In section one, Respondent properly states a taxpayer may recover actual, direct economicdamages, quoting from the statute. In making that determination, one would normaily look to the plain language of the statute, the legislative history of the statute, and the case law addressing the statute.

However, Respondent instead refers us to Affiliated UTE Citizens v. U.S., 406 US 128,155 (1972) and Randall v. Loftsgaarden, 478 US 647, 661 (1986) for a "general principle" that economic damages should be the excess of what the taxpayers would have received at the tax sale if given notice over what was actually received at that sale.

Of course this is nonsense.

First, the cases cited are not interpretive of 26 USC 7433. Affiliated involved damages under the Securities Exchange Act of 1934 for fraudulent conduct by the payor. 26 USC 7433 was not enacted until 1988, fully 16 years after the court's ruling and 54 years after the Securities Act of 1934. Randall involved the same securities act.

Further, the holdings of the case are NOT as proposed by Respondent. In Affiliated the court determined damages to be the difference between the value of property at the time of the sale and what was actually received. This court addressed numerous fair market valuation factors in making that determination. However, Respondent argues this court should find the damages to be the difference between the value of the property the taxpayers would have received at the tax

auction sale had Petitioner Lafonne Leeper received notice less what they did receive. No one can reasonably argue the IRS's minimum bid valuation in a tax case is any indication of fair market value. In this case, there is no better evidence of value than that cited in Respondent's brief. The buyer at the auction sale paid $40,022 and within 2 months had resold the same property for $200,000. The damages are known.

Finally, Petitioners submit the legislative history of 26 USC 7433 clearly reflects Congress's interest in protecting the taxpayer's equity from reckless and willful acts of IRS collection agents. That original intention in1988 has increased and now resulted in a series of new laws designed to protect taxpayers rights as clearly reflected in the committee reports recited in Petitioner's original petition. That is where the focus of this case belongs.

2. Conflict of Authority

The rest of Respondent's brief lauds Kabakjian v United States, 267 F.3d 208 (3d cir. 2001) as direct support for Respondent's case.

Again, Petitioner must challenge the veracity of Respondent's interpretation in that case. Kabakjian involved a tax protestor who received actual notice by certified mail rather than personal delivery. The 4th circuit did not find this clerical error in method of service to be a willful or reckless disregard under 7433. Rather, it was found to be substantial compliance. Further, the taxpayer's property was sold for more than 80 percent of the market value, a disparity the court found too small "to shock the conscience".

In the present case, the Respondent does not dispute the Petitioner Lafonne Leeper received no notice from the IRS, that failure to give her notice was reckless

and intentional, and that as a result her property was resold immediately thereafter for 5 times the tax sale price. Those circumstances shock anyone's conscience.

Petitioner's would submit that the facts of Kabakjian are far different than the facts of this case, and the ruling of the court adding the factor concerning a shocking loss of value actually supports Petitioner's claim for damages. This case further reflects the disparity of treatment of yet another court of appeals.

2. Conclusion

Petitioner's respectfully submit the IRS has unclean hands, a callous disregard for the damage inflicted by the reckless and intentional acts of its agent and a lack of respect for the profound importance of a taxpayer's constitutional rights.

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